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# **THESES (PREVENTIVE LAW), ANTITHESIS (ADVERSARIAL PROCESS), SYNTHESIS (SETTLEMENT, ADR): A COMMENT ON NYHART AND DAUER**

LOUIS M. BROWN\*

In terms of the Nyhart-Dauer article, the goal which is to be attained is "the commercial exploitation of the coastal zone and continental shelf."<sup>1</sup> The legal system aids the accomplishment of that goal by permitting parties to enter into contracts which "define the measure of present exchange and provide the standards by which executory performance will later be judged. . ."<sup>2</sup> The goal is achieved by performances in accord with "creative arrangements" developed "in such a way that their constituents will be most likely to accept and adhere to the undertakings to which they" are committed.<sup>3</sup> It is performance that counts. In an ideal, and often practical arrangement, performance is achieved without dispute and hence there is no need for concern about dispute resolution. But saying this does not eliminate a legal structure. Rather, it should be recognized that the initial function of the legal structure is to enable parties to achieve their goal. This is a starting point to the jurisprudence of preventive law.

Preventive law, as applied, can be said to start when a person, or other legal entity, is considering a goal to be achieved. The law, or legal devices, for example, contract, may be employed as a step in attaining the end objective, such as "the commercial exploitation of the coastal zone and continental shelf." This affirmative goal comes within the preventive law orbit. Because two or more legal entities are involved, common agreement among them is necessary. Such agreements are customarily achieved by a negotiating process. The process of coming to a common understanding usually includes the ironing out of differences. Where those differences are not resolved, agreement is not reached so that performance of the "commercial exploitation" may not be commenced. Note that it is the parties themselves in the

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1. Nyhart and Dauer, *A Preliminary Analysis of the Uses of Scientific Models in Dispute Prevention, Management and Resolution*, 1986 Mo. J. DISPUTE RESOLUTION 29.

2. *Id.* at 40.

3. *Id.* at 45.

negotiating process who either do or do not reach agreement. No external judicial or legal force is available to compel agreement. Law, however, is immediately involved. Law is attached when agreement is reached. Law even attaches when agreement is not reached because, for legal purposes, "no right" (to adopt a Hohfeldian term) is as much law as "right."

Preventive law is thesis. Litigation is antithesis.

A legal entity may achieve a goal unilaterally, that is, without outside help. In the commercial world the attainment of goals customarily requires some cooperative effort. For example, there may be a complex of interrelated entities in using the tidal forces of the Bay of Fundy for the creation of electrical power. These entities are legally tied by contractual arrangements. Sometimes dispute arises between the contracting parties. These disputes can be resolved by alternative dispute resolution mechanisms or by litigation. The Nyhart-Dauer article is not so much concerned with the potential for dispute among contracting parties as it is with the conflict that arises when competing performances conflict. There are, as the article points out, uses for the Bay of Fundy other than uses for creation of electrical power. When the use for one purpose conflicts with the use for another purpose, dispute arises. That conflict, or dispute, does not have its origin in contract between the disputing parties. It has its origin in the conflict that arises when interests clash.

Most of the Nyhart-Dauer article, like most legal education, concerns reasoning process that starts with dispute. The customary legal process for determining dispute is court litigation. Having said that preventive law is thesis, litigation is antithesis. The culmination of dispute is that its termination is ordered by the machinery of court process.

With this notion of thesis/antithesis in mind, consider further comparisons of preventive law and litigation law. The Nyhart-Dauer article points out that the area for solution of dispute is limited by the requirements of legal structure. Litigation does not seek to unify the differences. It sets legal consequences and legal result as the ordered "solution." By contrast, the unifying differences, if any, in contract formation are bonded by practical possibilities, with relatively minor legal limitations, for example, some promises (gambling) are not legally enforceable. So, to adopt the Nyhart-Dauer approach, the "solution space" in preventive law techniques is wide by comparison with the "solution space" in litigation.

In the legal spectrum, three process areas should be compared.

1. Thesis. Nonadversarial concerns of parties where, if there are differences, solution lies within the parties. The parties cannot in our society be subjected by legal requirement to third party (adversarial) command.

2. Antithesis. The adversarial process is at the other extreme of the spectrum. Procedures are invoked when dispute arises. This is the traditional court process where decision is made independent of any concurrence by the parties. Arbitration is an agreed procedure but the result is similar to judicial determination in that concurrence in the "solution" need play no part.

3. Synthesis. Settlement, as Alternative Dispute Resolution (ADR), may be regarded as midway in the legal spectrum. Its procedures commence after, or in connection with, dispute. Customarily, or often, ADR contemplates an arrangement in which there is common agreement among the disputing parties.

With this foundation in mind some further comparisons can be made.

One characteristic of preventive law negotiation is that parties are seeking contract formula for present and future purposes. Goals take time to complete. A common-sense expression is "Can the parties live with the anticipated agreement?" Can it be performed? Is it what the parties desire to achieve for the present and the future? The factor of forecasting the future is essential in contract formation. Forecasting the future need have no place in adversarial litigation. However, ADR can properly look to this preventive law technique. In ADR it is valid to look to a solution which takes into account the future circumstances of the parties.

Preventive law, in starting with goal to be achieved, or "purpose,"<sup>4</sup> is a more holistic concept than traditional conflict resolution. Purpose or goal is, in individual terms, a humanistic factor. The commercial exploration of the coastal zone and continental shelf involves, among other things, economic, political, and physical factors. The traditional legalistic formula for resolution of disputes need not, and ordinarily does not, take into account the full range of factors. ADR is not so limited and may, just as in preventive law techniques, take into account all factors involved in the makeup of the purposes or goal. There is, however, a significant difference between ADR and preventive law in this regard. In preventive law—nonadversarial process—court intervention is not ordinarily available when non-conflicting parties seek to enter into a contractual arrangement. In the dispute realm, if ADR does not accomplish solution (for example by negotiated settlement), the injured party may pursue the court solution. Therefore, the ADR process often proceeds with an eye to the court solution in the event of ADR failure.

ADR, like preventive law, ordinarily requires a willingness of the parties to proceed. We may develop in our legal system a required form of ADR, for example, mediation or mini-trial, but generally in the present state of legal process, ADR is available only with common agreement.

Court process is voluntary in one sense. The injured party has no legal requirement that the court process be used. We sometimes forget that the court process is sustained only if the parties, or at least one of them, initiates and maintains it. This factor leads to a significant principle in preventive law technique. An aspect of preventive law is that it seeks to minimize the risk of legal trouble. It seeks to minimize the risk of dispute and the subsequent use of the legal process. Preventive law involves prediction of future

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4. *Id.* at 35.

legal trouble and prediction of the consequences of the trouble which, among other things, seeks to predict whether dispute will arise and if dispute occurs, whether the adversarial process will be initiated and maintained.

ADR can also consider the future. Will the solution work? And if not, then to predict what process, if any, will be initiated and maintained. By contrast, traditional litigation need not, and often is not, concerned with the effect on the parties. ADR can achieve a more holistic result than can the adversarial process. There is in Nyhart-Dauer terms, more room in ADR for scientists to breathe<sup>5</sup> than in solutions using the adversarial process.

### A Summary

In jurisprudential terms we seek justice: justice in making the arrangement, justice in its performance, and just solutions in the event of dispute. Nyhart and Dauer point out restrictions in adversarial solutions, insufficient breathing space, narrow range of solutions, lack of sufficient concern for future effects, and lack of flexibility. Depending upon one's concept of justice, and just result, the adversarial process is less just than ADR. The push for a broader concept starts in the realm of preventive law with the widest freedom to consider all creative possibilities. ADR's limitation is that in the event of failure to achieve solution, the evident fallback on the adversarial process may restrict the freedom to find holistic creative solutions.

In practical terms, preventive law is an affirmative approach. It is positive and constructive. The adversarial process comes into play when there is some breakdown in accomplishing the goal or purpose. It is reactive to the dispute. Settlement through Alternative Dispute Resolution commences at the breakdown but seeks to restore goal accomplishment by techniques that resemble the preventive law process.

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5. *Id.* at \_\_\_\_.